NOT FOR PUBLICATION FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ALBERT E. RECALDE,	)	D.C. CV. No. 1997/0074
Petitioner,	)	28 U.S.C. § 2255
	)	
v.	)	Ref.: D.C. CR. No. 1989/0066
	)	3D CIR. No. 03-2874
UNITED STATES OF AMERICA,	)	
Respondent.	)	
	)	

MEMORANDUM OPINION AND ORDER

ALBERT E. RECALDE has moved Under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence ["Mot. to Vacate"], and the government has filed its opposition thereto.

I. FACTS AND PROCEDURAL HISTORY

Petitioner was charged in a four-count information with (1) conspiracy to import cocaine in violation of 21 U.S.C. §§ 952(a), 960 and 963; (2) importation of cocaine in violation of 21 U.S.C. §§ 952(a) and 960; (3) conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846; and (4) possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2. Petitioner was convicted on all counts by a jury on June 21, 1990, and was sentenced to twenty-five years incarceration on August 27, 1990.[1]

[1] The Honorable Barbara K. Hackett, United States District Judge of the Eastern District of Michigan, Sitting by Designation, presided over
(continued...)

On direct appeal, the Court of Appeals for the Third Circuit affirmed petitioner's conviction and sentence. *U.S. v. Recalde*, 935 F.2d 1283 (3d Cir.), *cert. denied*, 502 U.S. 893 (1991).[2] The Supreme Court denied certiorari on October 7, 1991, and petitioner filed the instant section 2255 motion on April 29, 1997 – five and one-half years after his judgment of conviction became final.

The amendments to 28 U.S.C. § 2255, which were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub.L. 104-32, § 105, establish a one-year limitation period, running from the latest of four specified dates. Because Recalde's conviction became final before the AEDPA took effect, the limitations period began running on AEDPA's effective date, April 24, 1996, giving Recalde one year from that date to file his section 2255 motion. *Cf. Carey v. Saffold*, 536 U.S. 214 (2002) (holding that where a conviction became final on direct review in April 1992, before the AEDPA took effect, the federal limitations

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[1](...continued)
petitioner's trial and sentencing.

[2] Petitioner raised the following arguments on his direct appeal to the Court of Appeals:

> 1. That he was denied due process when the court denied his motion to depose witnesses for the prosecution and when the prosecutor withheld information favorable to his case;
>
> 2. That the trial court erred when it denied his motion to sever the trial from the other defendants; and
>
> 3. That the court erred when it denied his motion to dismiss for violation of the Speedy Trial Act.

period began running on AEDPA's effective date, April 24, 1996, giving one year from that date to file a section 2244 federal habeas petition). Petitioner's section 2255 motion was received in this Court on April 29, 1997, but is timely in light of the "mailbox rule" which provides that a motion is filed at moment of delivery to prison authorities for forwarding to the district court.[3]

II. DISCUSSION

As grounds for his section 2255 motion, Recalde argues prosecutorial misconduct, ineffective assistance of counsel at trial and appeal, and that he was charged in an information instead of a grand jury indictment which did not state the quantity of drugs as part of the offense. Where, as here, the record is sufficient to allow a determination of ineffective assistance of counsel, an evidentiary hearing to develop the facts is not needed. *See* Rules Governing Section 2255 Proceedings, Rule 8; *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991).

A. Ineffective Assistance of Counsel

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[3] *Cf. Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (applying the "mailbox rule" to prisoner filings and holding that a *pro se* inmate's notice of appeal is deemed filed when it is delivered to prison authorities for forwarding); *see also Burns v. Morton*, 134 F.3d 109, 112 (3d Cir. 1998) (analogizing the prison mailbox rule to cases involving petitions for habeas corpus under § 2255); *In re Flanagan*, 999 F.2d 753, 759 (3d Cir. 1993) (holding that the prison mail room is essentially "an adjunct of the clerk's office," and a jurisdictionally sensitive document is deemed filed on deposit).

Petitioner, who was represented by Archie Jennings, Esq. ["Atty. Jennings"], argues that his Sixth Amendment right to counsel was violated at trial and on appeal when Atty. Jennings: (1) failed to object to and appeal violations of the sequestration rule, (Mot. to Vacate at 10-13); (2) failed to object to prosecutorial misconduct or request curative instructions from the trial court, (*id.* at 14-24); and failed to object to witness Kelly Glasock's ["Glasock"] testimony that she had transported cocaine for petitioner on two occasions before the offense as violating Federal Rule of Evidence 404(b) (*id*. at 25-33). The government argues that this Court should reject petitioner's ineffective assistance of counsel claims for failure to satisfy the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984).

As the Court of the Appeals for the Third Circuit recently stated:

> First, the defendant must show that, considering the facts of the case, his counsel's challenged actions were unreasonable, and, therefore, did not fall "within the range of competence demanded of attorneys in criminal cases." We review a defendant's claim under the "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Second, the defendant must show that he was prejudiced by counsel's conduct in that there is a "reasonable probability" that deficient assistance of counsel affected the outcome of the proceeding at issue.

United States v. Blakely, No. 02/2783, 2003 WL 21675346, at *1 (3d

Cir. Jul. 18, 2003) (internal citations omitted).

1. Sequestration of Case Agent

Petitioner argues that witnesses and the case agent had not been properly sequestered, and his attorney was ineffective in failing to appeal this issue. At the outset, there is simply no legal merit to petitioner's argument that the government's case agent, Steven W. Derr, should have been sequestered, nor does petitioner attempt to advance any legal basis for this claim. Rule 615 of the Federal Rules of Evidence provides that a court shall order the sequestration of witnesses upon the request of a party. Under Rule 615(2), however, the district court is not permitted to sequester a witness who is "an officer or employee of a party which is not a natural person designated as its representative by its attorney." *United States v. Gonzalez*, 918 F.2d 1129, 1138 (3d Cir. 1990) (holding that a case agent for the Government falls within this exemption, and ordinarily cannot be sequestered pursuant to Rule 615).

2. Sequestration of Witnesses

Petitioner also argues that sequestration rules were violated, thereby allowing for collaboration between the witnesses regarding their testimony. Specifically, he relies upon the testimony of Aida Cevallos ["Cevallos"] on cross examination by Maria Tankenson Hodge, Esq., counsel for co-defendant Louis Guerrero, to prove

collaboration:

> Q: And in connection with your imprisonment, has someone from the prosecutor's office prepared you in some way for your testimony today?
> A: Yes, ma'am.
>
> . . . .
>
> Q: Have you been removed to solitary confinement at any time in anticipation of this trial?
> A: Well, we had a small incident on Friday morning where we were in solitary confinement.
>
> . . . .
>
> Q: Did any of these persons with whom you are held in custody tell you that she had been told that her sentence would be lessened, if her testimony was acceptable to the Prosecution?
> A: Yes, ma'am.

(Tr. of June 19, 1990 at 72-74.) I find that Cevallos' testimony, contrary to petitioner's assertion, is vague and inconclusive, and surely does not prove that witnesses collaborated with each other. Accordingly, I find that petitioner has failed to show that Atty. Jennings' assistance at trial and on appeal regarding sequestration fell below the threshold set forth in *Strickland* and that he was prejudiced by counsel's conduct.

3. Prosecutorial Misconduct

In reviewing petitioner's claim of ineffective assistance for failure to respond to prosecutorial misconduct, I must initially consider whether the prosecutor's comments violated Recalde's right to due process in order to determine whether the trial counsel's

failure to respond prejudiced the outcome of this case and was objectively unreasonable. *See, e.g. United States v. Miles*, 53 Fed. Appx. 622, 630 (3d Cir. 2002).

I have reviewed the prosecutor's comments which petitioner alleges to be prejudicial, and can find no constitutional violation. Moreover, counsel's failure to object at trial, raise the issue on appeal, or otherwise address the prosecutor's comments neither prejudiced Recalde's defense nor fell below the standard of objectively reasonable conduct. Petitioner has simply failed to prove that counsel's conduct fell outside the wide range of reasonable professional assistance, or that counsel made an unreasonable strategic choice. *See Strickland*, 466 U.S. at 689. There was substantial evidence of Recalde's guilt; the jury was instructed that the attorneys would argue "what they believe they have been able to prove;" and the judge instructed that the arguments of counsel was not evidence. (Trial Transcript ["Tr."], Vol. IV at 5.) Lastly, petitioner has failed to demonstrate a "reasonable probability that, but for the unprofessional errors, the result would have been different." *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992) (citation omitted).

4. Counsel's Failure to Object to the Testimony of government witness, Kelly Glasock.

Petitioner alleges that Glasock made contradictory statements on the witness stand and that Atty. Jennings failed to object to

that testimony or request a curative instruction. (Mot. to Vacate at 27-33.) Specifically, petitioner takes issue with Glasock's statement that she had known petitioner for two and one-half to three years before the crime for which petitioner was charged. According to petitioner's calculations of the two years Glasock spent in prison, the longest she could have known him "on the street" was six months to one year. (*Id.* at 28.) Therefore, petitioner would conclude that Glasock could not have made two trips to London on his direction three years before the instant offense.

The government argues, on the other hand, that it is "entirely conceivable" that Glasock met the petitioner three years before the trial, participated in some drug schemes with him, and then spent two years in prison. (Motion to Dismiss and Memorandum ["Mot. to Dismiss"] at 8-9.) The government further argues that because Rule 404(b) testimony was proper, there would have been no reason for Atty. Jennings to request a curative instruction. As such, the government contends that counsel's performance in failing to request such an instruction did not fall below the level of customary skill and knowledge, and that petitioner has shown no prejudice that would suggest that the outcome of the trial would be different but for counsel's errors.

Having reviewed petitioner's claim under the strong presumption that the counsel's conduct falls within the wide range

of reasonable professional assistance, I agree with the government. The time frame Glasock testified to is not the smoking gun petitioner would have this Court believe, and I agree that it is entirely conceivable that petitioner and Glasock could have been involved in criminal activity while Glasock was out of prison. Again, petitioner has failed to prove that counsel's performance was unreasonable, or that he was prejudiced by counsel's conduct.

B. Charging Document: Information v. Indictment

Petitioner also argues that The Federal Rules of Criminal Procedure, Rule 7(a), requires that the offenses be charged in an indictment, and at no point did he waive that right. The government relies on the language of 48 U.S.C. § 1561 to argue that criminal prosecutions in this Court may be had by grand jury indictment or by information. The Court of Appeals has previously decided that the United States of America can prosecute a federal felony offense in the District Court of the Virgin Islands by information. *United States v. Ntreh*, 279 F.3d 255, 256 (3d Cir. 2002) ("[F]ederal felonies may be pursued by information in the Virgin Islands.").

C. **Relevant Conduct - Failure to State Quantity of Drugs Attributable to Petitioner**

Petitioner admits that he is guilty of money laundering, but denies involvement in the drug offenses for which he was convicted. He, therefore, argues that the trial judge *may* have improperly

calculated his offense level when it attributed the entire drug conspiracy to him. (Mot. to Vacate at 40, 43.) In fact, petitioner argues that under the U.S. SENTENCING GUIDELINES MANUAL ["U.S.S.G."] § 1B1.3 app. n.2(I), he could only be held accountable for relevant conduct that was within the scope of his agreement to complete illegal activity. (Mot. to Vacate at 42.) Petitioner also argues that the sentencing judge committed plain error when she determined drug quantity under the preponderance of the evidence standard. Lastly, he argues that Atty. Jennings rendered ineffective assistance at sentencing when he failed to highlight the limited role petitioner played in the drug scheme, thereby allowing the judge to base its sentence on the wrong guidelines. (Traverse of Nov. 18, 1997 at 19.) Petitioner requests an evidentiary hearing to determine the amount of drugs involved and his relevant conduct. The government argues that petitioner was found guilty on four counts of drug charges, and that the trial judge appropriately used the Sentencing Guidelines applicable to drug offenses.

I note at the outset that petitioner's statement of this issue is entirely conclusory and lacks recitation of any supporting facts. I have nonetheless examined Recalde's claim, and find that he has failed to show that the effectiveness of his counsel undermined the reliability of the conviction or sentence. Although petitioner would like me to accept that his only role was money

laundering, I find that his conviction was supported by substantial and credible evidence of his involvement in the drug offenses for which he was convicted. As such, based on the Sentencing Guidelines applicable to drug offenses at the time petitioner was sentenced in August 1990, the sentencing judge appropriately considered all reasonably foreseeable conduct that was within the scope of the criminal activity petitioner agreed to undertake with others. The Presentence Report ["PSR"] provides in relevant part:

> OFFENSE LEVEL COMPUTATION
>
> 7. Base Offense Level: According to Section 1B1.3(a)(2) Relevant Conduct, the entire offense conduct is taken into consideration when determining the offense level, and therefore the aggregate amount of cocaine from all 4 counts is included. The total amount involved is 68.7 kilograms. The guideline for a 21 U.S.C. 841 (a)(1) offenses [sic] is found in Section 2D1.1.(a)(3). According to the drug quantity table in this section, offenses involving 50 or more kilograms of cocaine have a Base Level of 36. In this case the amount for which the defendants were responsible is 68.7 kilograms of cocaine. 36
>
> 8. SPECIAL OFFENSE CHARACTERISTICS:
>
> Adjustment for role in the offense: +3
> According to the information given, Recalde provided transportation to a cocaine distribution group. He recruited couriers, paid their transportation and assigned a "cruise director" to see that all went well. He is believed to have exercised a degree of control and authority over others. Increase base level offense by 3 points.
>
> Victim Related Adjustment: None 0
>
> Adjustment for Obstruction of Justice: None 0

Adjusted Offense Level: (Subtotal) 39

(PSR at 10.)

I can find no merit in petitioner's challenge to the application of the Sentencing Guidelines. I thus reject his contention that Atty. Jenning's failure to raise the claim on direct appeal denied him his constitutional right of representation. *See United States v. Mannino*, 212 F.3d 835, 840-41 (3d Cir. 2000); *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992).

D. *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

In *Apprendi*, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 490. Petitioner requests that this Court apply *Apprendi* retroactively and find that his twenty-five year sentence violates his Fifth and Sixth Amendments rights. (Supplemental Memorandum in Support of Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 ["Supp. Mem."].) The government argues: (1) that petitioner's *Apprendi* claim filed on May 11, 2001 should be barred as a second or successive motion under the AEDPA; and (2) that *Apprendi* is a new rule of criminal procedure that may not be applied retroactively to cases on collateral review.

Under the AEDPA, a one-year period of limitation applies to a motion to vacate a sentence filed under section 2255. Section 2255 provides that the limitation period shall run from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> *3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or*
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (emphasis added). I find that petitioner's *Apprendi* claim is a second or successive petition under section 2255 and must be certified as provided in section 2244 by a panel of the Court of Appeals. Additionally, even if petitioner's *Apprendi* claim was not a second or successive section 2255 motion, it is well-settled that *Apprendi* does not apply retroactively to cases on collateral review. *See Tyler v. Cain*, 533 U.S. 656, 663 (2001) (construing § 2244(b)(2)(A), which applies to state prisoners, and which contains the same language as in section 2255, and holding that it is the only Court that can make a new rule retroactive for purposes of filing a second or successive habeas corpus application); *United States v. Enigwe*, No. 02-3343, 2003 WL

21664304, at *1 (3d Cir. July 15, 2003) (citing *United States v. Swinton*, 2003 WL 21436809 (3d Cir. June 23, 2003); *see also United States v. Jenkins*, 2003 WL 21398812 (3d Cir. June 18, 2003)).

III. CONCLUSION

For the reasons stated, this Court will dismiss petitioner's 28 U.S.C. § 2255 motion.

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Petitioner,	)	28 U.S.C. § 2255
v.	)	Ref.: D.C. CR. No. 1989/0066
	)	3D CIR. No. 03-2874
UNITED STATES OF AMERICA,	)	
Respondent.	)	

O R D E R

It is hereby

ORDERED that Petitioner's request for an evidentiary hearing is **DENIED**; and further

ORDERED that Petitioner's May 11, 2001 Motion for Leave to File Supplemental Memorandum Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure is **DENIED**; and further

ORDERED that the government's Motion to Dismiss is **GRANTED**; and further

ORDERED that Petitioner's 28 U.S.C. § 2255 motion is **DISMISSED**; and further

ORDERED that a **CERTIFICATE OF APPEALABILITY** shall **NOT** issue; and finally

ORDERED that the Clerk of Court shall **CLOSE** this file.

DONE AND SO ORDERED this 12th day of August 2003.

FOR THE COURT:

_____/s/_____
THOMAS K. MOORE
DISTRICT JUDGE

A T T E S T:
Wilfredo F. Morales
Clerk of the Court

_____
By: Deputy Clerk

Copies to:
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Albert E. Recalde, #88721-012, Atwater F.P.C., P.O. Box 019001, Atwater, CA 95301 - (Please Mark: "LEGAL MAIL: OPEN IN PRESENCE OF INMATE ONLY")
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